

Service Date: April 22, 1993

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER Of the Application)	TRANSPORTATION DIVISION
of Vernon R. Justice d/b/a Oil)	
Field Water Service, Dagmar,)	DOCKET NO. T-9917
Montana, for a Class B Montana)	
Intrastate Certificate of Public)	ORDER NO. 6170a
Convenience and Necessity.)	

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

Loren J. O'Toole and Loren J. O'Toole, II, O'Toole and
O'Toole, 209 North Main, P.O. Box 529, Plentywood, Montana

FOR THE PROTESTANT:

Raymond W. Brault, Attorney at Law, associated with Rader-
macher, Whiteside & Associates, 3203 Third Avenue North,
Suite 301, Billings, Montana 59101

BEFORE:

DENISE PETERSON, Staff Attorney and Hearing Examiner

INTRODUCTION

Pursuant to § 2-4-611, MCA of the Montana Administrative Procedures Act (MAPA), the Montana Public Service Commission (Commission) appointed Denise Peterson, Commission Staff Attorney, to conduct the hearing in this Docket. The Hearing Examiner issues the following Proposed Order.

BACKGROUND

1. On July 31, 1992 the Commission received an application from Vernon R. Justice, dba Oil Field Water Service (Applicant), Dagmar, Montana, for Class B authority to transport water for lease maintenance by tank truck. Applicant proposed to provide this service between all points and places in Sheridan, Roosevelt, Daniels and Valley Counties. On the same date, Applicant filed eight (8) supporting affidavits in support of temporary operating authority. Under Certificate No. 2478, Applicant has had Class B authority to transport water for drilling purposes since 1963 (leased from 1960).

2. On August 11, 1992 the Commission voted to grant temporary intrastate authority in this Docket per the application. Upon realizing that the quorum of Commissioners was not physically present at the time of the action (the votes were left

in absentia), the Commission issued an Amended Notice of Commission Action on August 18, 1992. A quorum met at a regularly scheduled meeting held Monday, August 17, 1992 and granted the requested temporary Class B authority for a period of 30 days from August 17, 1992 to September 17, 1992.

3. On August 13, 1992 Applicant filed an additional affidavit for temporary operating authority.

4. The Commission duly published Notice of Application in the legal sections of the Glasgow Courier and Plentywood Herald, as well as sending the Notice to the Commission's mailing list.

5. Koch Services, Inc. (Koch), filed a protest to the temporary application on September 1, 1992. Koch holds Certificate No. 3049 authorizing Class B transportation of water, drilling mud, liquid chemicals and crude oil for drilling purposes and for lease maintenance in Sheridan, Roosevelt, Garfield, Valley, Daniels, McCone, Richland and Rosebud Counties.

6. On September 14, 1992 the Commission received a formal protest from Ethel Ost dba Harvey Ost Oilfield Services (Ost), Fort Peck, Montana. Ost holds PSC No. 4531 and had just received approval of its application to transport drilling fluids, salt water, etc., in lease maintenance and exploration operations in

all of the counties affected by the application in Docket No. T-9917.

7. The Commission published Notice of Public Hearing in the legal sections of the Plentywood Herald and the Glasgow Courier scheduling an open public hearing for October 14, 1992 in Plentywood, Montana.

8. Vernon Justice applied for an extension of the temporary intrastate authority, PSC No. 2478, on September 14, 1992. The Commission granted the motion for extension of the temporary authority for a period of 60 days on September 21, 1992, from September 17, 1992 to November 17, 1992.

9. On September 23, 1992 Koch filed its protest of the permanent application. Protestant Koch served Interrogatories and Requests for Production September 22, 1992. Counsel for both Protestant and Applicant requested that the Commission move the hearing date to allow time for discovery.

10. The Commission published notice of the rescheduling of the public hearing for Wednesday, November 18, 1992 at 9:00 a.m. in the City Council Chambers in Plentywood, Montana. On November 18, 1992 the hearing was conducted by the designated hearing examiner, Denise Peterson.

10a. On February 24, 1993 the Hearing Examiner issued a proposed order. On March 16, 1993 Protestant Koch filed exceptions to the proposed order and requested an oral argument. On March 26, 1993 Applicant filed a response and brief to Koch's exceptions.

SUMMARY OF TESTIMONY

Testimony of Applicant's Witnesses

11. Vernon R. Justice (Applicant), Dagmar, Montana, appeared and testified in support of his application for Class B authority to haul water for oil field lease management. Mr. Justice, age 63, has been engaged in the oil field trucking business since 1960 when he leased the present authority. He purchased the authority in 1963 from George Morey of Roundup, Montana.

12. Mr. Justice testified that under this authority he has engaged in hauling water from producing leases since acquiring the authority in 1963. He has complied with Commission reporting requirements. The Commission has periodically inspected and audited the business. Mr. Justice employed five drivers, one mechanic and two office personnel at the time of the hearing. He

owns seven trucks, including pump trucks and vacuum trucks. He has a garage, radio equipment and dispatching facilities both at the office in Dagmar and in his home. Mr. Justice also owns and has significant investment in three disposal wells used for pumping excess water, salt water mainly, back into the ground. These wells are in Sheridan and Valley Counties, Dagmar, Coal-ridge and Lustre, Montana.

13. Under further direct examination Mr. Justice stated that he is a Native-American. He has obtained approval from the Fort Peck Tribes to operate on the 2.1 million acres of the Fort Peck Reservation. The Reservation is located in the four counties for which Applicant has applied for authority to haul water for lease management purposes.

14. Mr. Justice presently hauls water for Amax Oil & Gas, Beacon Exploration, Berenergy, Graham Royalty, Petro-Hunt, Samedan, Terra Energy, Vintage Petroleum, Devon Energy, Wyoming Resources, Berco Resources, Apache Corporation, Fred Klein, Hondo Oil and Gas and Pyramid Energy. His service includes hauling water from producing leases ("production work"), disposing of the water, and some service maintenance work. In response to his counsel's questions, Mr. Justice's testimony indicated that he

had performed his service for the preceding companies primarily in Sheridan County. However, he had done some work in Daniels County for Phillips Petroleum (no longer in the area), in Daniels County for Nerdlihc and in Valley County for Exxon. Although he could not recall the customer, he had worked in Roosevelt County as well. The wells Applicant has serviced in Sheridan County are within 10 to 15 miles from his base of operations in Dagmar, he testified. He concluded that he has serviced all the counties in his application at one time or another.

15. Under cross-examination, Mr. Justice testified that PSC Certificate No. 2478 (purchased from George Morey) authorized hauling of water and crude oil for drilling purposes. He admitted that he applied to the Commission to increase the activities he could perform under the certificate beyond what was authorized on the certificate. He testified that he knew the distinction between lease maintenance and hauling water and crude oil for drilling purposes. "Drilling purposes" relates to drilling of the oil well while lease maintenance has to do with keeping the well going after it is drilled, he testified. He admitted under cross-examination that not all of the hauling he had previously testified to was for drilling purposes. In fact, he had not

hauled water to drilling wells for two years and could not recall for what company.

16. Under more cross-examination, Mr. Justice testified that Fitzsimmons Trucking and Harvey Ost were also authorized to do lease maintenance work on the reservation, but not Protestant Koch. He admitted that there were many haulers with maintenance authority in the area he had applied for. In the immediate area, however, the only such hauler in Sheridan County is Koch.

17. During the cross-examination, there was some confusing question/answer exchange which ultimately elicited the following information. In one incident related to 1982, one in 1983 and one in 1987 in Docket Nos. T-6237, T-6235, T-6234, T-6233, T-6232, T-6231, T-7064 and T-12,967, the Commission issued various Orders to Show Cause which were cancelled per compliance. These orders to show cause were not citations, but rather an opportunity for the carrier to come into compliance, with cancellation of the Orders upon compliance. At the hearing, the Commission took administrative notice of these dockets.

17a. Protestant Koch filed an exception to Finding of Fact 53, arguing that the following statement is in error as to fact:

"Generally, the incident accounting for all but two of the

Orders to Show Cause related to one Colin J. Bowman who had leased authority from Vernon Justice and then incorrectly solicited business." This exception properly applies not to Finding of Fact 53, but to Finding of Fact 17, where the sentence actually appeared. However, the sentence was in error as to fact and has been deleted.

18. Under additional cross-examination, Mr. Justice admitted that he had made his living hauling for many years. From time to time he belonged to trucking associations. He had protested one water hauler's authority and at some time had examined another water hauler's authority. He testified, however, that he had not known he needed authority to do lease maintenance until about a year ago.

19. Ann Lambert, Brockton, Montana, appeared and testified in support of the application as director of the A & S Oil and Gas Department of the Fort Peck Tribes and the general manager of the A & S Development and Construction Company which is owned by the Fort Peck Tribe (Tribe) in Poplar. The Fort Peck Reservation (Reservation) is located in Roosevelt, Valley, Sheridan and Daniels Counties.

20. Ms. Lambert testified that the Tribe approves contrac-

tors to do business within the Reservation pursuant to ordinances in place on employment and contracting. By ordinance and tribal law, the tribe must grant approval for any hauling before a contractor may do business on the Reservation. Vernon Justice is an approved contractor for the purposes of hauling water from producing leases on the Reservation, according to her testimony.

The Tribe has developed oil and gas leases, by financing, drilling, operating and maintaining oil wells. She further testified that Koch Service does not have tribal approval and is not certified to haul water from oil wells on tribal lands.

21. Under cross-examination, Ms. Lambert stated that Fitzsimmons Trucking has water-hauling authority, while Ost has temporary hauling authority on the Reservation.

22. Spencer Kanning, Plentywood, Montana, appeared and testified in support of the application. Mr. Kanning, a contract pumper for 11 years, has worked for Petro-Hunt, Amax Oil & Gas, Berenergy, Coastal Oil & Gas, Pyramid, Wisco and others. On behalf of Berenergy, he testified that he has worked with the Applicant in pumping wells and that Mr. Justice hauled from these wells. Mr. Justice adequately performs the job, he testified.

23. Under cross-examination, Mr. Kanning testified that

Berenergy has used Koch primarily for service work, or lease maintenance work. Koch's work has been very professional, he testified.

24. Mr. Kanning also testified that he has never checked Justice's authority to see if he could do lease maintenance work, or anyone else's authority. He stated that he told the Applicant he would testify if authorized by any of the companies he represents. The Applicant told him he was filing the application because of a "technicality in the wording."

25. Mr. Kanning testified that no water carriers besides Koch provides service in the area that Justice provides it, to his knowledge.

26. Sidney E. McMahan, Williston, North Dakota, appeared and testified in support of the application as authorized by Amax Oil & Gas where he is a production foreman. He testified that the Applicant has hauled salt water from producing wells and fresh water for two leases, as well as providing maintenance work and doing refills. The wells are all in close proximity to the Dagmar area, within a four mile circumference and within Sheridan County. The proximity is essential to Amax's business, he testified, in the event of emergencies. He further testified

that he has also used the services of Koch, Paraffin (out of Sidney) and Hi-Line Trucking.

27. Under cross-examination, Mr. McMahan testified that he had last used Koch the same morning. He further stated that Koch services wells throughout his area. Applicant, however, is the closest. In picking a carrier, he looks at cost, distance and travel. In the year and nine months he has worked at Amax, Koch has provided service as needed and requested. He testified that he was supporting the application because he believed it was in the best interest of Amax to have competition in the area. His primary concern was the availability and closeness of Applicant's equipment.

28. David Morken, Dagmar, Montana, appeared and testified in support of the application. Mr. Morken has worked as a contract pumper for 15 years for 12 different companies. The only company authorizing his testimony was Amax. In general, he testified that he has used Applicant's water hauling service, that Applicant had the necessary equipment, and that the service was "convenient." Under cross-examination, he testified that he used Koch on a lot of leases. Koch has the necessary equipment and its service has been satisfactory.

29. Clarence Luft, Froid, Montana, production supervisor for Torch Energy Corporation, appeared and testified in support of the application. He has worked for Torch for 14 years and has personally known the Applicant for 20 years. He has engaged the services of Applicant at times to haul production water. Primarily Torch has used his services for filling tubing and perhaps hauling from one place to another. He explained that when there are holes in their tubing or the tubes have to be "pressured up," they pump salt or fresh water into the tubing to pressure it up and make sure the holes are fixed. Torch has used Applicant's vacuum services for leaks and to "suck" water or oil off the ground.

30. Mr. Luft testified that Applicant has provided various services to leases located in Southeast Roosevelt County about 20 miles east of Froid. He stated that it is a necessity to have Applicant's services continue because Torch has to have the option of calling more than one company.

31. Under cross-examination, Mr. Luft said he had used water-hauling carriers for lease maintenance work since 1976. He used Koch's services as his primary contractor. Koch has the equipment and makes a point to be in the area. Koch or Applicant

have rarely denied service. Besides Koch and the Applicant, Black Hills is available to provide service. But both Koch and Black Hills are not nearly as close as the Applicant.

32. Clayton Norby, Williston, North Dakota, appeared and testified in support of the application on behalf of Nance Petroleum and Terra Energy Corporation. He testified that the Applicant has hauled water for producing wells in the Brush Lake and Clear Lake Field areas since 1984 (Roosevelt and Sheridan Counties). The Applicant has the equipment to do the hauling. He has hauled water to drilling operations, moved water to disposals, pumped out production lines, tested tubing, and cleaned out cellars with vacuum trucks.

33. On cross-examination, Mr. Norby testified that Nance Petroleum and Terra Energy are affiliated entities. He responded that the hauling away of salt water and other materials from a lease was lease management work. Applicant has performed this service for him. He has also used Koch, Black Hills, Power Fuels and Missouri Basin. He never checked the certificates to see if Applicant had authority to do lease maintenance work. He said he understood that Applicant had made the application to clarify his permit.

34. Scott French, Medicine Lake, Montana, appeared and testified in support of the application. He has worked as a contract pumper for 14 years, presently for Vintage Petroleum, Slawson Exploration and Wyoming Resources. On behalf of Vintage Petroleum, he was authorized to testify for the Applicant. He had engaged the services of Applicant to haul water from wells located five to seven miles from Dagmar in Sheridan County and other locations. The Applicant hauls and disposes of water; tests tubing; if needed, fills tubing to make sure the pump is seated and the tubing is holding; and pressure tests flow lines.

Mr. French wants to continue using Applicant's services for the convenience of its being close, considering the number of marginal wells which cannot afford to pay any more for hauling and disposing the water.

35. Under cross-examination, Mr. French stated that he had used the services of Koch and its services had been satisfactory.

He contacts water haulers by phone call, mobile phone and radio communication. Koch has adequate equipment. In the Sidney area where he primarily works, however, he calls Paraffin Service. He said he was supporting the Applicant because the service he provides "around here" is a necessity for economic reasons and

time saving. For Applicant's area, other carriers may have authority but they would have to travel and be paid for the distance.

36. Gary E. Erickson, Plentywood, Montana, appeared and testified on behalf of Applicant as his accountant. His accounting firm prepared and sponsored two Petitioner's Exhibits, including a Balance Sheet for the period September 30, 1992, and the Annual Report of Oil Field Water Service. Mr. Erickson is Applicant's cousin and has done his accounting since 1973.

37. On cross-examination, Mr. Erickson testified that Applicant's net profit was \$110,489, which included other income than just the trucking operation. Under clarifying redirect, Applicant's accountant testified that the net income from trucking only was \$22,143.39, taking out the income from disposal of water.

Testimony of Protestant's Witnesses

38. Stephen C. Bowman, Westby, Montana, appeared and testified in opposition to the application. Without objection, Mr. Bowman read into the record his verified statement. He is superintendent for Districts 47 and 26 for Koch Service, Incorporated.

39. Mr. Bowman worked for his father as a driver and mechanic at Bowman Trucking from 1974 to 1986 when his father sold the business to Koch Service, Wichita, Kansas. Bowman Trucking was leased to Justice Trucking from 1974 to 1984 at which time his father leased to Koch Service until selling it in 1986. Mr. Bowman operated high pressure service trucks and vacuum trucks, the daily operations of the business, while his father handled the finances and paperwork. After purchase, Koch retained all the Bowman trucking personnel, designated Stephen Bowman as superintendent, and operated out of the Westby, Montana, shop and office from 1986 to 1992. Mr. Bowman testified that Koch was fortunate to stay reasonably profitable during this time.

40. In mid-1991 Glenn Miller offered Big M Oil Field Service (Big M) for sale to Koch. His revenues had been declin-

ing. Koch acquired Big M on January 10, 1992, retaining most of Big M's employees. Mr. Bowman testified that Koch had made a substantial investment to obtain the location of Big M's operations and customer base. Koch is committed to future growth in the area.

41. Mr. Bowman testified that lease maintenance work is completely different from drilling purpose work. Once the drilling is completed, the emphasis shifts to maintenance of the oil wells after they are put into production; including anything from pumping fresh water down the well, pumping flow lines, cleaning the "treater," and disposing of waste water.

42. Mr. Bowman's testimony affirmed the extensive equipment and personnel Koch has access to in Kansas, North Dakota, Montana and Idaho in order to meet any increase in workload and public requirements, including this service area. Koch stands ready to transfer necessary personnel and equipment as needed on a permanent basis.

43. Under cross-examination, Mr. Bowman testified that Koch has no trucks sitting idle in North Dakota. There are 15 idle units in Kansas, to be dispatched as needed.

44. Mr. Bowman further testified that he and his father

were leased to "Vernon" (Applicant) ("in the trucking business with him") before 1986. With "Vernon" they hauled to more companies at that time because of the oil boom. After Koch bought his father's trucking operation in 1986, Koch serviced probably six or seven companies. Koch has done some service work for Amax and Vintage, also serviced by Applicant. For David Morken, Koch does 80 percent of the work for the companies that he works under. For Clarence Luft, Koch does about 95 percent of the work for Torch.

45. Mr. Bowman testified under further cross-examination that trucks used for lease maintenance and oil drilling purposes are the same, either pressure trucks, vacuum trucks, or roper trucks. Bowman Trucking under Applicant's authority had these kinds of trucks as did Applicant. Presently Koch has about 725 vehicles total in 62 locations in the United States and Canada. Not all these trucks are used for hauling water. Koch Services is profitable in the water hauling business, he testified, but Applicant's proposed service threatens Koch's profitability. In the last six months Koch noticed a drop in profitability, but he admitted that the decline in crude oil barrels moved has been about 5,000-10,000 in the past six months.

46. In response to examination by the hearing examiner, Mr. Bowman admitted that his father, as lessor, was the subject of the order to show cause in 1982 which was administratively noticed. The Commission cancelled the Order to Show Cause when Mr. Bowman's father corrected his activities about which the Commission had doubts.

47. Mr. Glenn Miller, Plentywood, Montana, appeared and testified in opposition to the application. He now owns Sheridan Water Disposal, Incorporated. He owned Big M Oil Field Service from 1965 to 1992 when he sold the business to Koch. In 1967 he had authority to haul water, liquid drilling mud, liquid chemicals and crude oil for drilling purposes only, all in bulk in tank vehicles. In 1970 he obtained authority for additional counties and changed the wording from drilling purposes only to include lease maintenance so that he could do all the work he had been doing. He "sold out" to Koch in 1992 because the oil business had declined and it was difficult to make a profit. Mr. Miller blamed operators leasing to Applicant for forcing him out of business. However, he absolved Koch as a fair competitor, "fair as anybody."

48. Mr. Miller testified that Applicant had protested Big

M's application for increased authority in 1970. Mr. Miller also indicated that he complained to the Commission back in 1982 about questionable lease operators "all ... doing their own thing," all of them leased to Applicant. He testified that the Commission did its job to put a stop to it. While the commission was in the area, it investigated "everything we were doing."

49. Mr. Miller owns several salt-water disposal wells, which are essential to a lease maintenance operation. He alleged that some of Applicant's lessors failed to pay for dropping off loads, causing lost revenues. He also testified that Applicant and his lease operators were responsible for his losing between 35 and 50 percent of his total business. He said he probably would have stayed in the business if the competition had not driven the price down.

FINDINGS AND DISCUSSION

50. In ruling on an application for a Certificate of Public Convenience and Necessity, the Commission makes a threshold determination on whether the Applicant is fit, willing and able to provide the service. The Commission considers the financial condition of the Applicant; Applicant's intention to perform the

service sought; Applicant's experience in conducting the service sought; the adequacy of Applicant's equipment; and past performance of any illegal operations.

51. The record supports a finding that Applicant is willing and able to provide the service of transporting water for lease maintenance by tank truck. He is in sound financial condition, has equipment adequate to perform the service, and has at least 30 years of experience in transporting water in tank trucks. The record, however, does raise some question of illegal operations in the past. Although his certificate only allowed transportation for drilling purposes, the Commission finds that Applicant has performed lease maintenance activity for a long period of time. The real question is whether these illegal operations indicate that Applicant is unfit and should not be allowed the authority to transport water for lease maintenance of oil wells.

51a. Protestant Koch filed an exception to Finding of Fact 51, arguing that substantial credible evidence did not exist for the Hearing Examiner to conclude that Applicant was in sound financial condition. The record includes the testimony of Applicant's accountant; Exhibit 6, Applicant's balance sheet as September 30, 1992; and Exhibit 7, Applicant's annual report for

the period ending December 31, 1992. All three forms of evidence indicate that Applicant's business is profitable. Applicant's failure to break out transportation-related assets and liabilities from the balance sheet is immaterial. The question is simply whether Applicant is financially sound. Based on the evidence presented, the Commission concludes substantial credible evidence existed to support the finding that Applicant is financially sound.

51b. Protestant Koch filed a second exception to Finding of Fact 51, arguing that the Hearing Examiner failed to make a finding that Applicant was illegally operating trucks for hire. The Hearing Examiner did conclude in Finding of Fact 51 that Applicant engaged in illegal operations. The Hearing Examiner's failure to specifically identify which statutory provisions were violated is immaterial as long as the illegal operations generally were taken into consideration.

52. Past illegal operations are only one factor in determining fitness. In every other respect, Applicant is obviously fit. While the Commission condemns willful, bad faith illegal operations, it has taken the position in the past that not even willful operations are automatic grounds for denial of an appli-

cation. Rather, the Commission has considered past willful misconduct as one element in determining present and future fitness. Whitt Construction Company, Docket No. T-8453, Order No. 5638a, para. 30. Where illegality is willful, the Commission weighs the severity and the circumstances of the illegal conduct against the public interest in the proposed service. Id. When the public interest and need for the service outweigh the intent to perform illegal operations, the Commission has ruled that economic regulation justifies findings of fitness and the granting of the application. Id.

52a. Protestant Koch filed an exception to Finding of Fact 52, arguing that there is no law nor facts to support the Hearing Examiner's finding. The Commission reads Finding of Fact 52 as stating the law governing illegal operations in the context of a determination of carrier fitness. The Hearing Examiner's statement of the law in this respect is correct. Though an applicant's illegal operations are relevant and an important factor in determining carrier fitness, the Commission does not take the inflexible position that such operations are automatic grounds for denial of an application. This position is in accord with that taken by the Interstate Commerce Commission. See Armored

Carrier Corporation v. United States, 260 F.Supp. 612, 615 (1966). When determining the fitness of an applicant who has engaged in willful illegal operations two things need to be considered: 1) the severity and circumstances of the illegal conduct, and 2) the public interest in the prospective service. See Howard Sober, Inc., Extension, 83 M.C.C. 361 (1960).

53. Determinations of fitness are made on a case-by-case basis. The Commission finds that Applicant did not willfully perform an illegal operation, i.e., deliberately do lease maintenance work for 20 to 30 years in violation of his certificate. Upon being informed that his operations were in violation, Applicant immediately applied for temporary authority and permanent approval of a modified certificate adding lease maintenance authority. The Commission performed routine audits and investigations over the span of Applicant's existing certificate. Applicant had reason to have a good faith belief that his hauling activities were permissible until he was notified. The innuendos raised by Protestant on the Orders to Show Cause point the finger back to Protestant's witness. Mr. Bowman was in charge of operations of lessor Bowman Trucking during the years that the lessee's activities were called into question. Upon Bowman's

compliance, the Commission was satisfied.

53a. Protestant Koch filed an exception to Finding of Fact 53, arguing that the finding fails to follow applicable law and is contrary to the testimony and files of the Commission. In support of this argument Koch quotes without attribution to Transportation Law by John Guandolo, where reference is made to Floyd & Beasley Transfer Co., Inc., Extension, 79 M.C.C. 269 (1959). In that case, fitness was not found where the applicant was an experienced motor carrier, well aware that its operations were outside the scope of its authority. However, the Transportation Law text also cites to the case of Howard Sober, Inc., Extension, 83 M.C.C. 361 (1960), where the I.C.C. found the applicant fit despite continued illegal operations after notice that such operations were unauthorized. There is simply no bright-line test to determine whether illegal operations should preclude a finding of fitness. Based on his experience and knowledge, the record in this case could support a finding that Applicant willfully conducted illegal operations. However, the determinative issue is whether the severity of this willful misconduct was such that a finding of fitness is unwarranted. While the Commission cannot excuse Applicant's conduct as being

entirely inadvertent and in good faith, we also cannot conclude from the record evidence that it was deliberate and in total disregard of the law. Therefore, the Commission affirms the Hearing Examiner's finding of fitness.

53b. Protestant filed a second exception to Finding of Fact 53, arguing that the following two sentences are in error: "The innuendos raised by Protestant on the Orders to Show Cause point the finger back to Protestant's witness. Mr. Bowman was in charge of operations of lessor Koch, while his father did the financial part during the years that the lessor's activities were called into question." The second sentence was in error and has been corrected. Additionally, Koch's argument that Steve Bowman was only a "driver and mechanic" is contradicted by Bowman's statement that he was responsible for the daily operations of the business. TR, p. 34, ll. 3-4.

54. The Commission finds that it cannot infer a bad faith violation on the part of Applicant. Further, the Commission finds that Applicant had acquired a water-hauling authority and, not having a sophisticated operation, did not distinguish the difference between drilling and lease maintenance activities until pointedly told. Therefore, the Commission does not need to

weigh a public interest against a severity of willful misconduct.

Based on the record, the Commission finds that the illegal operations resulted from a good faith violation of the existing certificate. The Commission finds instructive Armored Carrier Corporation v. United States (an I.C.C. decision). If unauthorized transportation operations were inadvertently begun and continued in good faith, these continued operations would not bar a grant of authority to perform them. 260 F.Supp. 612, 614 (1966).

54a. Protestant Koch filed an exception to Finding of Fact 54, arguing that the record evidence does not support the conclusion that Applicant's illegal operations were inadvertent and in good faith. This argument has been adequately addressed in Finding of Fact 53a.

55. Next, the Commission will examine whether public convenience and necessity require a grant of the requested authority, pursuant to § 69-12-323, MCA. Pan American Bus Lines Operation, 1 M.C.C. 190 (1936), stated the questions implicit in a decision on public convenience and necessity as follows:

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be

served as well by existing lines of carriers;
and whether it can be served by applicant
with the new operation or service proposed
without endangering or impairing the opera-
tions of existing carriers contrary to the
public interest. 1 M.C.C. at 203.

56. The first question in determining public convenience and necessity is whether there is shipper demand and need for the service. The shipper testimony indicates that there is a decided need for this service in Applicant's territory. While oil drilling activities have diminished, the existing wells require substantial maintenance. The shippers find it particularly convenient for both emergencies and economy to have Applicant, who is in the area, provide the lease maintenance service. The proximity of Applicant to the oil fields makes Applicant's service not only economical but also uniquely available in the service territory applied for. The Commission finds that public convenience and necessity require this service.

56a. Protestant Koch filed an exception to Finding of Fact 56, arguing that the record evidence does not support a finding that Applicant's service is uniquely available in the service area applied for. In this regard, Applicant presented a number of supporting shippers at hearing who felt Applicant provided a needed service. The reasons varied from Applicant's availability

when other carriers were busy to Applicant's proximity to the witnesses' well sites. Specifically, Clarence Luft testified that it was a necessity to have an additional carrier for those occasions when other companies are busy. TR, p. 100, ll. 8-12. Sidney McMahan even indicated there were times Protestant Koch denied service because of unavailability. TR, p. 88, ll. 3-5. Mr. McMahan also testified that Applicant's proximity is important in case there is an emergency such as a blowout. TR, p. 85, ll. 15-20. Scott French testified that Applicant's proximity and lower travel time costs are important because of the economics of maintaining marginal wells. TR, p. 115, ll. 4-8. While the term "unique" may not properly describe Applicant's services, it is obvious he is able to provide services which are not always available from the existing carriers. Of course, if the record indicated that the existing carriers normally had equipment available within a reasonable distance of Applicant's location, the Commission would be obligated to find that the existing carriers were capable of serving the need. However, there is not the case. On this basis, the Commission concludes 1) shipper need exists for the service provided by Applicant; and 2) the existing carriers are not able to adequately meet this need. To

the extent that Finding of Fact 56 was intended to convey these conclusions, we agree with the Hearing Examiner.

57a. Protestant Koch filed two exceptions to Finding of Fact 57. One of these exceptions pertained to the Hearing Examiner's conclusion that Bowman Trucking was engaged in illegal activities while leased to Applicant. The other was directed at the Hearing Examiner's suggestion that it would be unduly harsh to allow Koch to take away business first developed by the Applicant. While the Commission understands the Hearing Examiner's concern with the possible involvement of the Bowman's in the illegal activities previously discussed, the fact remains that such involvement, even if true, is immaterial to whether the existing carriers can meet the need for the proposed service. Likewise, the fact that it would constitute a harsh result to allow Protestant Koch to serve a need first developed, albeit illegally, by Applicant is also immaterial. For this reason, the entire paragraph has been stricken.

58a. Protestant Koch filed a lengthy exception to Finding of Fact 58. This exception, summarized, is directed at the Hearing Examiner's statements regarding large carriers and their capabilities to serve shipper needs. Exception is also taken with the

underlying conclusion that Applicant can meet shipper needs better than the existing carriers. The Commission agrees with many of the arguments presented by Koch and the entire paragraph has been stricken. In regard to whether the Applicant can meet the shipper need better than the existing carriers, the question is more properly framed as to whether the existing carriers can meet the need for the proposed service. See Section 69-12-323, MCA. While the Commission has no doubt that Koch and other existing carriers can provide the type of service needed by the shippers, the need of the shipper witnesses also includes ready availability and location of equipment. In this case, we believe availability and location are important considerations in determining the public convenience and necessity. See In the Matter of the Application of Harvie's Hotshot Service & Trucking, Inc., Docket No. T-9881, Order No. 6161 (December 22, 1992) (Location of existing carriers considered in determining public convenience and necessity). Since Applicant is able to provide a service not always available from other carriers, the Commission is willing to find that the existing carriers are unable to meet the need.

59. Therefore, the Commission must proceed to the last level of analysis under . 69-12-323, MCA: would a grant of this

additional authority harm the operations of existing carriers contrary to the public interest? The Commission finds that the answer to this question is "No."

60. After Koch Service bought Mr. Bowman's father's trucking business in 1986, Applicant and Koch coexisted in the area, providing service as requested. In 1992 Koch purchased Big M Oil Field Service from Mr. Glenn Miller, Plentywood, Montana. It was Mr. Miller's testimony that Big M was having difficulty making a profit, and he blamed Applicant and not the purchaser, Koch. Not until the hearing in 1992 did Koch (which had just purchased the local trucking business of Big M) allege that Applicant's authority, if granted, would harm its operations. Shortly after the purchase, the allegations of long-term illegal misconduct surfaced and hence, this application.

61. This application, if granted, would allow the continuing activities that Koch alleges had illegally occurred for years, without apparently harming its business. Mr. Bowman's testimony supports a finding that Koch's revenues have declined as a result of the decline in crude oil hauling and not the water hauling competition from Applicant. Koch did not allege harm to its operations until after it acquired the marginal hauler, Big

M. However, the testimony is that Koch already has a large share of the business in Applicant's area. The Commission fails to see how Applicant can threaten Koch's large operation in Applicant's meeting a localized need. The Commission finds the record replete with testimony that both the Applicant and Koch can continue to coexist and provide service. Koch's diverse operation with 725 vehicles nationwide will not be harmed by a grant of this application.

62. The Commission finds that the Justice Oil Field Water Service's application for Class B authority to haul water by tank trucks for lease maintenance should be granted. Applicant is fit, willing and able to perform this service. There is a public need for this service, the existing carriers cannot adequately meet this need, and a grant of this application will not harm existing carriers.

63. The Commission further finds that oral argument on the exceptions filed by Protestant Koch is unnecessary, and Koch's request for oral argument therefore is denied.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercis-

es jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. The application does propose an operation that will serve a useful public purpose responsive to a public need.

4. At this time the existing carriers are unable to adequately serve this need.

5. The authority granted in this order will not endanger or impair the operation of existing carriers contrary to the public interest.

6. After hearing upon the application and after giving reasonable consideration to the effect of the proposed operation upon other transportation agencies, the Commission concludes from the evidence that public convenience and necessity require the authorization of the proposed service as described below.

Section 69-12-323(2), MCA.

ORDER

NOW THEREFORE IT IS ORDERED that the Application in Docket No. T-9917 be granted. The Commission grants the following

authority:

Class B - Water for lease maintenance by tank truck between all points and places in the following counties: Sheridan, Roosevelt, Daniels and Valley.

IT IS FURTHER ORDERED that the request of Koch Services, Inc. for oral argument on its filed exceptions is denied.

IT IS FURTHER ORDERED that all objections and motions made during the hearing in this Docket that were not ruled on are denied.

Done and Dated this 19th day of April, 1993 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman

BOB ROWE, Vice Chairman

DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.